

Indiana Department of Administration

M/WBE Participation Policy for Indiana Department of Transportation State-Funded Construction Projects

I. Introduction

The Indiana Department of Administration ("IDOA") is committed to Minority and Women participation in the state's procurement and contracting process. As a result, it will require Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) participation or evidence of adequate Good Faith Efforts to obtain such participation as a specification in bids for Indiana Department of Transportation (INDOT) construction contracts of \$200,000 and over with subcontracting opportunities effective January 1, 2006. *See* Indiana Code 5-22-7, 5-22-7-2, 5-22-7-4.

II. Definitions

"Application for MBE and WBE Program Waiver" means a document submitted by a Bidder for relief from a contract goal if the Bidder believes that the contract in question provides no reasonable subcontracting opportunities. A bidder must request an application for the MBE and WBE Program Waiver from IDOA and submit the Waiver for approval before the bid due date or letting.

"Bidder" means a contractor that intends to or has submitted a bid on an INDOT project at an INDOT letting.

"Certification" means verification by the Indiana Department of Administration, Minority and Women's Business Enterprises Division ("MWBED") or an organization accepted by the MWBED with respect to the authenticity of a minority or women owned business enterprise.

"Commercially useful function" means a determination that an enterprise performs a commercially useful function and will be made based on the following considerations:

- (1) An MBE or a WBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the MBE or WBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether an MBE or a WBE is performing a commercially useful function, one must also evaluate the following:
 - (A) The amount of work subcontracted.
 - (B) Standard industry practices.
 - (C) Whether the amount the enterprise is to be paid under the contract is commensurate with the work it is actually performing.
 - (D) The credit claimed for its performance of the work.
 - (E) Other relevant factors.
- (2) An MBE or a WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MBE or WBE participation. In determining whether an MBE or a WBE is such an extra participant,

one must examine similar transactions, particularly those in which MBEs or WBEs do not participate.

(3) In the case of construction contracts, if:

- (A) an MBE or a WBE does not perform or exercise responsibility for at least the requisite percent of the total cost of its contract with its own workforce; or
- (B) the MBE or WBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved;

then it is presumed that the enterprise is not performing a commercially useful function.

"Good Faith Efforts" means documentation of all efforts taken by the Bidder that demonstrates the quality, quantity and intensity of its efforts to achieve the MBE/WBE goals on a particular bid submission.

"Good Faith Efforts Worksheet" means the document that the Bidder must complete and submit with supporting documentation to INDOT within three days of receiving notification that although the Bidder submitted the low bid, it did not meet the MBE/WBE goals.

"Letter of Commitment" means a signed letter, on company letterhead, serving as acknowledgment from the minority and/or women certified business of their level of participation in a specific project, the dollar amount of the commitment, the scope of service or product to be provided and the anticipated dates of utilization. The Bidder must deliver or fax the Letters of Commitment to INDOT Contract Administration at 317-233-8862, no later than 24 hours after INDOT posts the unofficial bid results on the INDOT website: <http://www.in.gov/dot/div/contracts/letting/index.html>.

"Minority and Women Business Enterprises Division (MWBED)" means the Division of the IDOA that acts on behalf of the state to actively promote, monitor and enforce the MBE and WBE program and is the final authority on all matters pertaining to the maintenance and administration of the MBE and WBE program and compliance thereto.

"Minority/Woman Business Enterprise (MBE and WBE)" means an individual, partnership, corporation, limited liability company, or joint venture of any kind that is at least fifty-one percent (51%) owned and controlled by one (1) or more persons who are United States citizens and a member(s) of a minority group or are women. The MBE and WBE must meet the eligibility requirements of 25 IAC 5.

"Participation Plan" means the IDOA prescribed document that sets forth the MBE and WBE subcontractors that will perform work under the contract.

III. Minority and Women Business Enterprise Certification

MBE and WBEs listed on the Participation Plan must be listed on the IDOA directory of certified firms at the time of bid letting to be eligible to meet the contract goals. The Bidder must verify that a firm is certified before the bid is submitted.

Questions regarding MBE and WBE certification should be addressed to the following:

Indiana Department of Administration
Minority and Women's Business Enterprises Division
402 West Washington Street, Room W469
Indianapolis, IN 46204
(317) 232-3061
www.buyindiana.in.gov
mwbe@idoa.in.gov

IV. Bidding Process

INDOT will review projects for viable subcontracting opportunities. All state-funded projects will be governed by this policy unless otherwise stated.

The MWBED will be available to answer any questions and to assist Bidders in locating MBE and WBE firms to engage in the contract prior to bid letting.

The 2007-2008 Contract Goals for construction projects are 7% for MBE's and 5% for WBE's.

Effective January 1, 2006, IDOA implemented the following procedures for the acceptance and evaluation of responsive and responsible bids.

- Bidders must submit a Participation Plan on the approved form listing the utilization of MBE and WBE subcontractors who will provide a commercially useful function on the project.
- Per 25 IAC 5-6-2(d), all prime contractors, including MBE and WBE prime contractors, must meet subcontracting goals through the use of businesses found in the IDOA directory of certified firms. MBE and WBE prime contractors will get no credit toward the contract goal for the use of their own workforce.
- If the Bidder does not achieve the MBE/WBE contract goals, and is otherwise determined by INDOT to be the low-Bidder on the contract, INDOT will provide written notification to the Bidder of its failure to meet the MBE/WBE contract goals. The Bidder shall have three (3) business days after the receipt of notification to provide INDOT Contract Administration Division with a written response (the "Response"). The Response shall set forth evidence of the Bidder's Good Faith Efforts and affirmative actions taken prior to the bid letting to achieve the goals. The Response should take the form of a completed Good Faith Effort Worksheet and be accompanied by all supporting documentation of the efforts made to achieve the goal prior to letting.

The Response should be sent to the following address:

Indiana Department of Transportation
Contract Administration Division
N855 Indiana Government Center
Indiana Government Center North
100 North Senate Avenue
Indianapolis, IN 46204

The failure of the Bidder to file a Response within three (3) business days may result in rejection of the bid, forfeiture of the bid bond, and the referral of the Contractor to the INDOT Prequalification Committee.

If a Response is timely made, INDOT will forward the Response, any supporting documentation, copies of all Bid Proposal books and any Commitment Letters to the MWBED. The MWBED shall formally review the information for compliance with the Good Faith Efforts requirements.

The MWBED may use any of the following criteria in determining whether Good Faith Efforts have been made:

- A. Notice to MBEs and WBEs. Whether and when the Bidder provided written notice by mail, hand delivery, facsimile or electronic transmission to all qualified MBEs and WBEs that perform the type of work to be subcontracted and advising the MBEs and WBEs:
 1. of the subject work the Bidder intends to subcontract;
 2. that their interest in subcontracts is being solicited;
 3. how to obtain information for the review and inspection of contract plans and specifications; and
 4. how to bid on the subcontracting opportunities and deadlines.
- B. Economically Feasible Contract Portions. Whether the Bidder selected economically feasible portions of the work to be performed by an MBE and WBE, including, when appropriate, breaking subcontracts into smaller pieces or combining elements of work into economically feasible units. The ability of the Bidder to perform the work with its own forces will not excuse the Bidder from making positive efforts to meet the MBE and WBE goals.
- C. Consideration of all MBE and WBE quotations. Whether the Bidder considered all quotations received from MBEs and WBEs and for those quotations not accepted, an explanation of why the MBE and WBE will not be used during the course of the project. Receipt of a lower quotation from a non-MBE and WBE will not, in itself, excuse the Bidder's failure to meet the MBE and WBE goals. Price alone does not constitute an acceptable basis for rejecting MBE and WBE subcontractor bids unless the Bidder can demonstrate that a reasonable price was not obtained from an MBE and WBE.
- D. MBE and WBE Barrier Assistance. Whether the Bidder provided assistance to interested MBE and WBE firms such as reviewing the contract plans and specifications or addressing other barriers to subcontracting.

- E. Advertisement. Whether the Bidder advertised to search for prospective MBE and WBEs to participate in the contract.
- F. Agency Assistance. Whether the Bidder contacted any of the following agencies for the purpose of locating prospective MBEs and WBEs:
 - 1. Indiana Department of Administration
Minority and Women's Business Enterprises Division
402 West Washington Street, Room W469
Indianapolis, IN 46204
(317) 232-3061
mwbe@idoa.in.gov
 - 2. Indiana Business Diversity Council, Inc.
2126 North Meridian Street
Indianapolis, IN 46202
(317) 921-2678
mdhouse@inbdc.org
- G. Research Participation Areas. Whether the Bidder made efforts to research other possible areas of participation including supplying, shipping, engineering and any other role that may contribute to the production and delivery of the products or services needed to fulfill the contract.
- H. Response Time. The time the Bidder allowed for a meaningful response to its solicitations.
- I. Documentation of Statements from MBE and WBEs. Any documentation or statements received from MBEs and WBEs evidencing that they have been contacted by the Bidder.
- J. Availability of MBEs and WBEs. The availability, or lack of availability, of MBEs and WBEs to perform the work and in the location where the work is to be performed.
- K. Other Criteria. Any other criteria deemed appropriate by the MWBED.

The above list is not intended to be exclusive or exhaustive. The Bidder may also submit documentation of other types of efforts that it has taken that reflect the quality, quantity and intensity of those efforts.

When evaluating a Bidder's Good Faith Efforts, the MWBED reserves the right to verify the accuracy of any information supplied by the Bidder. The Bidder agrees to provide, upon request, earnest, diligent and prompt cooperation in the MWBED's verification process.

If MWBED finds that adequate Good Faith Efforts have been made, it will forward all documents to INDOT Contract Administration Division with a recommendation that INDOT award the contract to the Bidder.

If the MWBED determines that the Bidder's Good Faith Efforts were inadequate, **the MWBED shall advise the Bidder in writing of its determination and its right to a hearing before the M/WBE Compliance Review Committee (the "Committee") pursuant to 25 IAC 5-7-7.**

If, as the result of the hearing, the Committee determines that the Bidder's Good Faith Efforts were sufficient, the Committee shall issue a written finding to INDOT's Contract Administration Division recommending that the contract be awarded to the Bidder.

If the Committee determines that the Bidder's Good Faith Efforts were inadequate, the Committee shall issue a written finding to INDOT's Contract Administration Division, recommending that the contract not be awarded to the Bidder. INDOT's Contract Administration Division shall then forward the Committee's recommendation together with all documentation to the INDOT Commissioner. The INDOT Commissioner shall have the sole discretion to determine whether to award the contract to the low Bidder, or without further proceedings, either direct that the contract be awarded to the next lowest, qualified bidder or that all bids shall be rejected and the contract be re-let.

The Commissioner's determination shall become the final decision of the Department concerning the award of the specific contract at issue.

By submission of a bid, a Bidder thereby acknowledges and agrees to be bound by the regulatory process set forth in 25 IAC 5.

A Bidder who knowingly or intentionally misrepresents the truth about either the status of a firm that is being proposed as an MBE and WBE or who misrepresents the level of the nature of the amount to be subcontracted to the MBE and WBE may suffer penalties pursuant to Indiana Code 5-16-6.5-5.

A Contractor who knowingly or intentionally misrepresents the truth about his/her status as an MBE and WBE or who misrepresents the level or the nature of the amount subcontracted to his/her firm may suffer penalties pursuant to Indiana Code 35-44-2-1.

V. Compliance

Contractors shall contract with all MBE and WBE firms listed on the Participation Plan. The subcontract or purchase order shall be for an amount that is equal to, or greater than, the total dollar amount listed on the form.

Contractors shall notify the MWBED immediately if any firm listed on the Participation Plan refuses to enter into a subcontract or fails to perform according to the requirements of the subcontract.

The Contractor's proposed MBE and WBE contract goals will become incorporated into and made a requirement of the contract. Contractors shall not substitute, replace or terminate any MBE and WBE firm without prior written authorization from The MWBED.

Contractors shall cooperate and participate in compliance reviews as determined necessary by The MWBED. Contractors shall provide all necessary documentation to show proof of compliance with the requirements as requested by The MWBED.

VI. Non-Compliance

After the bid is awarded and if The MWBED determines that the contractor is not in compliance with its Participation Program, The MWBED will notify the contractor, in writing, within ten (10) days after the initial compliance review or the site visit and identify the deficiencies found and the required corrective action that should be taken to remedy the deficiencies within a specific time period.

If a contractor is found in noncompliance, the contractor must submit, in writing, a specific commitment to correct the deficiencies. The commitment must include the precise action to be taken and the date for completion.

If the MWBED determines the contractor has failed to comply with the provisions of this Participation Program, or 25 IAC 5, IDOA may recommend to INDOT that it impose any or all of the following sanctions:

- a. Withholding payment on the contract until such time that satisfactory corrective measures are made.
- b. Adjustment to payments due or the permanent withholding of retainages of the contract.
- c. Suspension or termination of the contract in which the deficiency is known to exist. In the event this sanction is employed, the contractor will be held liable for any consequential damages arising from the suspension or termination of the contract, including damages caused as a result of the delay or from increased prices incurred in securing the performance of the balance of the work by other contractors.
- d. Referral to INDOT's Prequalification Committee for consideration of appropriate sanctions in accordance with 105 IAC 11-1-20.
- e. A determination that continued non-compliance is a material breach of the agreement between INDOT and the contractor, giving INDOT all the rights and remedies available to it under the contract or at law.
- f. Suspension, revocation, or denial of the MBE or WBE certification and eligibility to participate in the MBE or WBE program for a period of not more than thirty-six (36) months.

VII. PARTICIPATION PLAN

MINORITY AND WOMEN'S BUSINESS ENTERPRISES PARTICIPATION PLAN

A Bidder is expected to submit in its contract bid a Minority and Women's Business Enterprises Participation Plan in accordance with IC 4-13-16.5 and 25 IAC 5. The Plan must show that there are, participating in the proposed contract, Minority Business Enterprises (MBE) and Women Business Enterprises (WBE) listed in the Minority and Women's Business Enterprises Division (MWBD) directory of certified firms. A Bidder must indicate the name of each MBE and WBE firm with which it will work, the firm's contact name and phone number, the service supplied by the firm, the specific dollar amount from this contract that will be directed toward each firm, and the approximate date these products and/or services will be utilized. If participation is met through use of vendors who supply products and/or services, the Bidder must also indicate the vendor's tax ID number as well as provide a description of products and/or services provided to the Bidder that are directly related to this contract and the cost of direct supplies for this bid. All prime contractors, including MBE and WBE prime contractors, must meet the contract goals through use of subcontractors. MBE and WBE prime contractors will get no credit toward the contract goal for the use of its own workforce. The State does not accept national plans.

Failure to meet these requirements will affect the evaluation of your bid. The Indiana Department of Transportation (INDOT) reserves the right to verify all information included in the Plan.

Bidders are encouraged to contact and work with MWBD to design a plan to meet established goals. MWBD's website address is www.IN.gov/idoa/minority/ and contains a complete list of all INDOT's certified MBEs and WBEs.

Minority & Women's Business Enterprises Participation Letter of Commitment

A signed letter on company letterhead from each participating MBE and WBE must be submitted within 24 hours of the INDOT posting of unofficial bid results. A commitment letter shall serve as acknowledgement from the MBE and/or WBE of its amount of participation, the scope of products and/or services, and approximate date these products and/or services will be utilized.

By submission of the bid, the Bidder acknowledges and agrees to be bound by the regulatory processes involving the State's M/WBE Program. Questions involving the regulations governing the Plan should be directed to MWBD's Compliance Unit at 317/232-3061

MBE/WBE PARTICIPATION PLAN

CONTRACT NUMBER _____ LETTING _____

DATE _____

BIDDER _____

ADDRESS _____

CITY/STATE/ZIP _____

PHONE () _____

The following MBEs and/or WBEs listed in the MWBD directory will be participating in the contract:

<u>MBE/WBE</u>	<u>PHONE</u>	<u>COMPANY NAME</u>	<u>SCOPE OF PRODUCTS/SERVICES</u>	<u>UTILIZATION DATE</u>	<u>AMOUNT</u>

*If additional room is necessary, indicate here _____. Please attach a separate page.

THIS DOCUMENT MUST BE INCLUDED IN YOUR BID

VIII. GOOD FAITH EFFORT

**Indiana Department of Administration
Indiana Department of Transportation Construction Contract
GOOD FAITH EFFORTS WORKSHEET**

BIDDER _____ BID/PROJECT NUMBER _____

CONTRACT GOALS 7% MBE 5% WBE; PARTICIPATION ACHIEVED MBE ___% WBE ___%

List the M/WBEs contacted and complete the following information for each. Copies of all communications to and from each vendor should be maintained.

Company Name and Address	MBE	WBE	Type of Contact	Date of Contact	Date Response Due	Goods Or Services Requested	Result (Include Price Quote)

Indicate all **Good Faith Efforts** made to include MWBEs in this project. Check and explain all that apply or should be considered. **Please provide evidence in the form of documentation** of the efforts that to be considered. A complete description of each criterion may be found in the **Indiana Department of Administration M/WBE Participation Policy for Indiana Department of Transportation State Funded Construction Projects. See also 25 IAC 5-7-5.**

GFE Type	√	Description
M/WBE Barrier Assistance		
Advertisement		
Agency Assistance		
Other Criteria		